

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

77-6172

To be argued by
RICHARD N. PAPPER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6172

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff-Appellant,

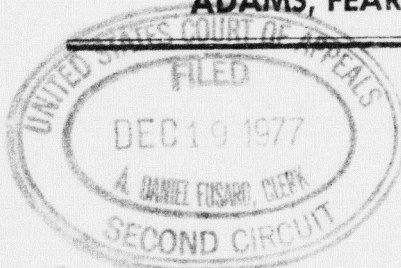
—v.—

DEPARTMENT OF TRANSPORTATION, BROCK
ADAMS, as Secretary of Transportation, JOHN J.
FEARNSIDES, as Acting Director, Materials Trans-
portation Bureau, ALAN I. ROBERTS, as Acting
Director, Office of Hazardous Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEES
DEPARTMENT OF TRANSPORTATION,
ADAMS, FEARNSIDES AND ROBERTS**



ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Appellees Depart-
ment of Transportation, Adams,
Fearnside and Roberts.*

RICHARD N. PAPPER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented	2
Statement of the Case	2
Statement of Facts	6
ARGUMENT:	
POINT I—The District Court did not err in holding that 5 U.S.C. § 558 (c) does not, in itself, provide a right to notice and a public hearing	13
POINT II—The District Court did not err in holding that § 109 (a) of the Hazardous Materials Trans- portation Act provides no right to notice and a hearing on the DOT approvals issued in com- pliance with the new regulations	15
POINT III—ACMC lacks standing to challenge the approvals issued by DOT under the regulations	19
POINT IV—ACMC may not raise in this litigation, for the first time, its contention that DOT is required to afford “public participation” with regard to each application approval	26
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

<i>Association of Data Processing Service Organizations v. Camp</i> , 397 U.S. 150 (1970)	25
---	----

	PAGE
<i>Bowles v. Seminole Rock Co.</i> , 325 U.S. 410 (1945) ..	18
<i>Chemical Leaman Tank Lines v. United States</i> , 368 F. Supp. 925 (D. Del. 1973)	14
<i>Cincinnati Electronics Corp. v. Kleppe</i> , 509 F.2d 1080 (6th Cir. 1975)	21
<i>City of Hartford v. Towns of Glastonbury</i> , 561 F.2d 1032 (2d Cir. 1977)	20
<i>Environmental Defense Fund v. Hardin</i> , 428 F.2d 1093 (D.C. Cir. 1970)	27
<i>Kessler v. Federal Communications Commission</i> , 326 F.2d 673 (D.C. Cir. 1963)	26
<i>Kixmiller v. Securities and Exchange Commission</i> , 492 F.2d 641 (D.C. Cir. 1974)	27
<i>Lincoln Transit Co. v. United States</i> , 25 F. 1pp. 990 (S.D.N.Y. 1973)	14
<i>Machinery Dealers National Association v. Lockheed Aircraft Corp.</i> , Dkt. No. 75-1958 (D.C. Cir., August 25, 1977)	21, 22, 23
<i>Morgan Associates v. United States Postal Service</i> , 387 F. Supp. 947 (S.D.N.Y.), <i>aff'd on other grounds</i> , 511 F.2d 1223 (2d Cir. 1975)	21
<i>New York v. United States</i> , Dkt. No. 76-4085 (2d Cir., Mar. 2, 1977)	27
<i>New York Pathological & X-Ray Laboratories v. Im- migration and Naturalization Service</i> , 523 F.2d 79 (2d Cir. 1976)	15
<i>Norwalk CORE v. Norwalk Redevelopment Agency</i> , 395 F.2d 920 (2d Cir. 1968)	21
<i>Perkins v. Lukens Steel Co.</i> , 310 U.S. 113 (1940) ..	21
<i>Portland Cement Association v. Ruckelshaus</i> , 486 F.2d 375 (D.C. Cir. 1973)	27

	PAGE
<i>Scanwell Laboratories v. Shaffer</i> , 424 F.2d 859 (D.C. Cir. 1972)	21
<i>Sisselman v. Smith</i> , 432 F.2d 750 (3d Cir. 1970) ..	14
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	20
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976)	20
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	18
<i>Union Carbide Corp. v. Train</i> 73 F.R.D. 620 (S.D. N.Y. 1977)	21
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	19
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	20, 23, 25, 26
<i>Wei v. Robinson</i> , 246 F.2d 739 (7th Cir.), <i>cert. denied</i> , 355 U.S. 879 (1957)	6

Statutes:

Administrative Procedure Act, *as amended*, 5 U.S.C.

§§ 551 *et seq.*, 80 Stat. 378:

5 U.S.C. § 551 (6)	16, 17
5 U.S.C. § 551 (8)	4
5 U.S.C. § 558	2, 3, 5, 13, 14, 15

Hazardous Materials Transportation Act, 49 U.S.C.

§§ 1801 *et seq.* (Supp. V, 1970), 88 Stat. 2156:

49 U.S.C. § 1801	2, 3, 4, 5
49 U.S.C. § 1804	6, 19
49 U.S.C. § 1808	2, 4, 5, 13, 15, 16, 17, 18

Regulations:

49 C.F.R. § 1.53	6
49 C.F.R. § 107.1	6
49 C.F.R. § 107.307	18
49 C.F.R. § 173.300a	2, 3, 5, 9, 10, 11, 16, 18, 24
49 C.F.R. § 173.300b	2, 3, 4, 5, 10, 12, 16, 18, 24
49 C.F.R. § 178.01 <i>et seq.</i>	6

Federal Register Notices:

38 Fed. Reg. 838 (Jan. 19, 1971)	6, 8
41 Fed. Reg. 18412 (May 6, 1976)	6, 7, 8, 9, 10, 11
41 Fed. Reg. 38167 (Sept. 9 1976)	18

Other Authorities:

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 233 (1946)	14
S. Rep. No. 1380, 89th Cong., 2d Sess. (1966) ..	14

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE,
Plaintiff-Appellant,

—v.—

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of Transportation, JOHN J. FEARNSIDES, as Acting Director, Materials Transportation Bureau, ALAN I. ROBERTS, as Acting Director, Office of Hazardous Materials Operations, and ENGINEERING PRODUCTS OF CANADA, LTD.,

Defendants-Appellees.

BRIEF FOR APPELLEES DEPARTMENT OF TRANSPORTATION, ADAMS, FEARNSIDES AND ROBERTS

Preliminary Statement

On October 10, 1977, the Honorable Milton Pollack, United States District Court for the Southern District of New York, dismissed the amended complaint of plaintiff-appellant American Cylinder Manufacturers Committee ("ACMC"). The District Court held that defendants were not required to permit plaintiff or its members—domestic manufacturers of compressed gas cylinders—to participate with the Department of Transportation ("DOT") in the granting of approvals (pur-

suant to 49 C.F.R. § 173.300a and b) to foreign cylinder manufacturers seeking to conduct inspections, chemical analyses and tests of compressed gas cylinders outside the United States.

The District Court's opinion and order, which have not been reported, appear in the Joint Appendix at 127-38.

Issues Presented

1. Did the District Court err in holding that § 9(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 558(c), provides no right to notice and a public hearing on each application for the inspection and manufacturing approvals at issue here?

2. Did the District Court err in holding that § 109(a) of the Hazardous Materials Transportation Act, ("HMTA"), 49 U.S.C. § 1808(a) (Supp. V, 1970), provides no right to notice and a public hearing on the applications for approvals?

3. Does ACMC have standing to maintain this action?

4. May ACMC raise in this litigation issues that were never presented in the six-year rulemaking proceeding which led to the adoption of the regulations under which the challenged approvals were issued?

Statement of the Case

Plaintiff-appellant ACMC is an unincorporated trade association of domestic manufacturers of compressed gas cylinders whose members produce approximately 90 percent of the compressed gas cylinders manufactured in the

United States. (1a, 87a).^{*} Defendants-appellees are DOT and the Secretary of DOT; the Acting Directors of DOT's Materials Transportation Bureau ("MTB") and Office of Hazardous Materials Operations ("OHMO"); and Engineering Products of Canada, Ltd. ("EPC"), whose application to have its cylinders chemically tested and analyzed outside the United States was approved pursuant to the DOT regulations involved in this case. (1-2a, 87-88a).

ACMC brought this action to enjoin DOT from approving applications submitted pursuant to two regulations relating to shipping container specifications which were duly promulgated under the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq.* One of the regulations, now codified at 49 C.F.R. § 173.300a, provides that OHMO may approve applications from independent inspection agencies to inspect the manufacture of compressed gas cylinders outside the United States. The other regulation, 49 C.F.R. § 173.300b, authorizes OHMO to permit foreign manufacturers to have chemical tests and analyses of their products conducted outside the United States. Both regulations provide for the submission of detailed data by persons applying for DOT approval. The purpose of the inspections, tests and analyses is to determine whether the cylinders produced by the foreign manufacturers may be used for transportation of hazardous materials within the United States.

ACMC initially contended that the procedures employed by DOT to approve EPC's application violated § 9(c) of the APA, 5 U.S.C. § 558(c), because they did not provide for notice in the *Federal Register* or "public participation" in the decision to approve or deny each application submitted pursuant to the regulations for

^{*} Numerical references followed by the letter "a" refer to the Joint Appendix previously filed with this Court.

inspection or manufacturing approvals.* (3-4a). It was also alleged that the procedures used by DOT to approve EPC's application—and thus the procedures DOT intended to use for all other applications—were “arbitrary and capricious.” (4-5a). Subsequently, ACMC amended its complaint to allege, in addition, that § 109(a) of the HMTA, 49 U.S.C. § 1808(a), also required notice and a public hearing on each application. (91a).

This action does not challenge the validity of the regulations themselves. On the contrary, ACMC has explicitly conceded that the regulations were validly promulgated. (101-102a). What ACMC does challenge is the process by which inspection and manufacturing approvals are issued pursuant to the regulations.**

In making this challenge, ACMC advances a novel theory of administrative law. Congress has determined that DOT and its component agencies should have the responsibility of regulating compressed gas cylinders used in transporting hazardous materials within the United States. *See* 49 U.S.C. § 1801. ACMC, however, does not agree with this Congressional determination. It argues, instead, that DOT can make informed and objective decisions on the applications of foreign manufacturers only with the aid of ACMC and its members—the domestic cylinder manufacturers with whom the foreign applicants would presumably be in direct competition.

On September 2, 1977, by order to show cause, ACMC sought a temporary restraining order and preliminary injunction staying the effective date of DOT's approval of the application of EPC to conduct analyses and tests of its cylinders outside the United States, and enjoining

* It is conceded that the approvals are in the nature of licenses as that term is used in the Administrative Procedure Act, 5 U.S.C. § 551(8).

** Approvals pursuant to 49 C.F.R. § 173.300b for the performance of chemical analyses and tests outside the United States are commonly called “manufacturing approvals.”

defendants from issuing any other approvals under 49 C.F.R. § 173.30(a and b. (21-22a). In its complaint (5a) and subsequently in its amended complaint (91a), ACMC also sought a declaratory judgment nullifying the approval issued to EPC, as well as a permanent injunction enjoining defendants from processing or issuing any approvals under the regulations, except in accordance with the procedures requested by ACMC.

The District Court denied the application for a temporary restraining order. (21-22a). Defendants subsequently moved to dismiss the complaint (140a) and, after ACMC amended its complaint, to dismiss the amended complaint. (57-59a).

On October 10, 1977, after consolidating the motion for preliminary injunction with the trial on the merits (20a), the District Court dismissed the amended complaint. In its opinion (127-38a), the District Court said that it was "highly doubtful" that ACMC had standing to challenge the approvals issued by DOT (134a), and noted that the defendants' challenge to ACMC's standing "seems well taken" (135a). It concluded, however, that even assuming that ACMC did have the requisite standing, neither § 9(c) of the APA, 5 U.S.C. § 558(c) nor § 109(a) of the HMTA, 49 U.S.C. § 1808(a), conferred on the domestic cylinder manufacturers a right to notice and participation in DOT's decisions on applications received, pursuant to 49 C.F.R. § 173.300a and b, from foreign cylinder manufacturers. (135-37a).

ACMC then appealed the District Court's decision. The District Court denied ACMC's motion for a stay pending appeal. (141a).

Statement of Facts

DOT, through OHMO, is charged with the function of prescribing regulations governing the transportation of hazardous materials in commerce within the United States. It is responsible for enforcing those regulations as they relate to shippers of hazardous materials and manufacturers of containers for hazardous materials. 49 U.S.C. § 1804(a); 49 C.F.R. §§ 1.53 107.1. This function includes prescribing, administering and enforcing regulations governing the manufacture of compressed gas cylinders.* 49 C.F.R. §§ 178.01 *et seq.*

On May 4, 1976, DOT's Materials Transportation Bureau published in the *Federal Register*, 41 Fed. Reg. 18412, amendments to 49 C.F.R. Parts 173 and 178. These amendments, which relate to foreign-made compressed gas cylinders (and are now codified at 49 C.F.R. 173.300a and b), authorize the inspection and manufacturing approvals at issue in this lawsuit.

Regulations Relating to Inspection, Testing and Chemical Analysis of Compressed Gas Cylinders Before the Amendments

Under the old DOT regulations, all cylinders subject to DOT regulation had to be inspected, tested and chemically analyzed in accordance with DOT's cylinder specifications (49 C.F.R. Part 178) before they could be used

* Compressed gas cylinders are metal containers used to transport various compressed gases, including argon, carbon dioxide, oxygen, helium and nitrogen. The gases contained in the cylinders are put to a wide variety of medical and industrial uses. See 38 Fed. Reg. 838 (Jan. 19, 1971).

The contents of the *Federal Register* must be judicially noticed. 44 U.S.C. § 1507; *Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir.), *cert. denied*, 355 U.S. 879 (1957).

for transporting hazardous materials in commerce within the United States. 41 Fed. Reg. 18412 (May 4, 1976). Inspection involves an examination of various components and surfaces of the cylinders. Tests involve physical stressing of cylinders and tests on the physical properties of the metals in completed cylinders. Chemical analysis is performed to determine the composition of the metals in the cylinders. (28a).

The regulations, before the amendments contained in § 173.300a and b, required all tests and analyses to be performed within the United States. This requirement was commonly called the domestic test and analysis rule. The old regulations did not specify who was to perform tests and analyses, so long as the tests and analyses were conducted within the United States. 41 Fed. Reg. 18412; 28-29a.

Inspection, however, could be performed abroad. The cylinders covered by DOT's specifications fall within two categories: high-pressure cylinders and low-pressure cylinders. Under the old regulations, high-pressure cylinders had to be inspected by persons not employed by the cylinder manufacturer—i.e., by “disinterested” inspectors. But the regulations permitted inspection of low-pressure cylinders by employees of the manufacturer. *Id.*

Reasons for Amendment of the Old Regulations

The old domestic test and analysis rule dated to 1922. It was originally intended to protect American citizens against gas cylinders of uncertain “pedigree.” *Id.* However, in recent years it became clear that there was no longer any rationale for the existence of the domestic test and analysis rule. 41 Fed. Reg. 18412. While there was a necessity for such a rule before rapid transoceanic communication and travel, its justification had vanished

in an era of speedy travel and communication and of active worldwide exchange of complex industrial and scientific information. At a time when modern technology made it possible for DOT to perform an inspection of a cylinder manufacturer at a foreign location almost as quickly as domestically, and to establish properly supervised methods of analysis and testing outside the United States, the 1922 rule had become an anachronism. *Id.* It no longer served its original function, and only operated to exclude foreign cylinder manufacturers almost completely from the American market because of the costs, inconvenience and delays entailed in compliance with the domestic test and analysis rule. 41 Fed. Reg. 18412-13.

Another concern was that the domestic test and analysis rule improperly made DOT a *de facto* regulator of national economic policy and foreign trade. This was because DOT in effect determined whether or not foreign-made cylinders should be imported, and in what quantities. *Id.* These issues are more properly addressed to Congress and to those federal agencies charged by Congress with the responsibility for setting policy in the economic and international trade areas. Thus, not only was the rule anachronistic, but it also improperly made DOT in effect responsible for sensitive policy decisions which had nothing whatever to do with its Congressional mandate to regulate transportation safety. *Id.*

The Rulemaking Proceeding Leading to the Amendments Codified in 49 C.F.R. § 173.300a and b

Responding to these concerns, DOT commenced a rulemaking proceeding by a notice of proposed rulemaking published in the *Federal Register* on January 19, 1971. 36 Fed. Reg. 838. The purpose of the rulemaking was to determine what changes, if any, should be made in the domestic test and analysis rule.

Between 1971 and May 4, 1976, when the amendments were published in final form, DOT conducted exhaustive rulemaking proceedings. Comments were invited at several stages of the six-year rulemaking proceeding; over 300 were received. 41 Fed. Reg. 18412. In addition, hearings were held at which a number of interested parties presented in detail their views on the proposed amendments. *Id.*

The District Court found that APMC "participated very extensively" in the six-year rulemaking. (129). APMC "provided comments to the public docket on almost every aspect of the proposed amendments." *Id.*; 27-28a. Despite this vigorous involvement in every phase of the deliberations that led to the adoption of the amendments, at no time did APMC, either at hearings or in its comments, raise its present contention that there must be notice and an opportunity for public participation by domestic cylinder manufacturers with regard to each approval application. (129-30a; 28a). It failed to raise this point despite the fact, as the District Court found, that "such matters were within the scope of the rulemaking." (130a).

The six-year rulemaking process culminated in the publication of the amendments at issue here on May 4, 1976 in the *Federal Register*. 41 Fed. Reg. 18412. By the terms of the notice in the *Federal Register*, the new regulations were made effective May 30, 1976.

The New Regulations

The amendments to 49 C.F.R. Parts 173 and 178 require foreign manufacturers of low-pressure cylinders, as well as domestic and foreign manufacturers of high-pressure cylinders, to use DOT-approved independent inspection agencies. 49 C.F.R. § 173.300a; 41 Fed. Reg. 18412. An independent inspection agency is equivalent to

the old "disinterested" inspectors. 41 Fed. Reg. 18412. If a foreign manufacturer wishes to conduct tests and analyses outside the United States, that manufacturer also must itself obtain DOT approval by submitting the detailed information required by the new regulations to OHMO. 49 C.F.R. § 173.300b. Thus, the new regulations require at least one DOT approval (of the inspection agency) and usually two approvals (of the inspection agency and the manufacturer) before any cylinder covered by DOT specifications may be manufactured outside the United States.

While the old rules required only high-pressure cylinder manufacturers to use disinterested inspectors, the new regulations require independent inspection agencies for *all* foreign manufacturers, as well as for domestic high-pressure manufacturers. 41 Fed. Reg. 18412. Those inspectors must be approved by DOT. 49 C.F.R. § 173.300a. In addition, even if a foreign manufacturer conducts tests and analyses within the United States, and thus is not itself subject to DOT approval, it cannot manufacture cylinders without using an independent inspection agency approved by DOT.* 49 C.F.R. §§ 173.300a and b.

The regulations thus achieve three important objectives. They increase the availability of compressed gas cylinders to the public. They set high safety standards which increase transportation safety, and hence the safety of the public. And they remove DOT from the

* In the same rulemaking proceeding, DOT also proposed to require domestic manufacturers of low-pressure cylinders to use independent inspection agencies. That proposal has been severed from this docket and is presently under consideration. 41 Fed. Reg. 18412.

arena of foreign trade and economic policy, a field in which it has no expertise and for which it has no mandate from Congress. 41 Fed. Reg. 18413; 30-31a.

Issuance of Approvals Under the New Regulations

In order to be approved by DOT as an independent inspection agency, an applicant must meet the requirements set forth in 49 C.F.R. § 173.300a. The applicant must neither be a manufacturer of cylinders for use in the transportation of hazardous materials, nor be controlled directly or indirectly by any person or firm which does manufacture cylinders. 49 C.F.R. § 173.300a(a). The applicant must submit a written application to OHMO, giving details concerning himself and each person with an interest in the applicant, and identifying each facility where tests and inspections are to be performed. 49 C.F.R. § 173.300a(b)(1)-(3). If the applicant is not a permanent resident of the United States, he must designate as his agent for service of process a person who is. 49 C.F.R. § 173.300a(b)(4). The applicant must describe in detail his inspection and testing facilities and the qualifications of each person who will certify the inspection and test results. 49 C.F.R. § 173.300a(b)(5)-(6). The inspection approval is conditioned on the applicant's allowing OHMO access to the inspection site (with the applicant bearing the cost of OHMO's inspection) and making his records available to OHMO. 49 C.F.R. § 173.300a(c) and (i).

The procedure for obtaining DOT approval to conduct chemical tests and analyses of cylinders outside the United States is spelled out in 49 C.F.R. § 173.300b. An applicant must submit his application for approval of non-domestic chemical analyses and tests in writing to OHMO. The application must set forth the applicant's name, address and telephone number, together with a description

of each facility at which cylinders are to be manufactured and chemical tests and analyses are to be performed. 49 C.F.R. § 173.300b(b)(1)-(2). If the applicant is not a resident of the United States, he must designate a permanent United States resident as his agent for service of process. 49 C.F.R. § 173.300b(b)(3). He must also identify the independent inspection agency he intends to use. 49 C.F.R. § 173.300b(b)(5).

The application must also

[s]et forth complete details concerning the dimension, materials of construction, wall thickness, water capacity, shape, type of joints, location and size of openings and other pertinent physical characteristics of each specification cylinder for which approval is being requested, including calculations for cylinder wall stress and wall thickness. . . .

49 C.F.R. § 173.300b(b)(4).

In order to give OHMO close and continuing control over the manufacturer as a means of insuring cylinder safety, the regulation requires the manufacturer to permit OHMO to inspect his manufacturing and testing facilities, and to examine his files and the cylinders themselves. 49 C.F.R. § 173.300b(g).

On August 31, 1977, pursuant to the procedures set forth in 49 C.F.R. § 173.300a and b, OHMO issued an approval for non-domestic tests and analyses to EPC and an inspection approval to Warnock Hersey Professional Services Ltd., EPC's independent inspection agency. On September 1, 1977, OHMO issued approvals to another firm and its independent inspection agency. (32-36a). Other applications for approvals have been submitted to OHMO pursuant to the regulations. *Id.*

ARGUMENT**POINT I**

The District Court did not err in holding that 5 U.S.C. § 558(c) does not, in itself, provide a right to notice and a public hearing.

Initially, ACMC alleged only one basis for its contention that it should be permitted to participate in DOT's deliberations on the applications, under the new regulations, of the potential foreign competitors of ACMC's members. Its rationale was that § 9(c) of the APA, 5 U.S.C. § 558(c), provided a right to notice and a public hearing on each application for inspection and manufacturing approval (1-6a). Then, in its amended complaint, ACMC added § 109(a) of the HMTA, 49 U.S.C. § 1808(a), as a statutory authorization independent of the APA for notice and a public hearing. Now, on this appeal, ACMC appears to have abandoned its APA argument. It does not set forth the § 558(c) question as an issue for review by this Court (Brief for Appellant at 2-3) and, other than a cryptic reference to "the right of participation conferred by 5 U.S.C. § 558(c) of the Administrative Procedure Act," *id.* at 27, there is not a single reference to § 558(c) in its brief.

If this contention has been abandoned, it is with good reason. 5 U.S.C. § 558(c) provides, in pertinent part:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

The legislative history of what is now § 558(c) demonstrates that this provision was not meant, in and of itself, to require a hearing. If there was to be such a requirement, it would have to be found in a statute other than the APA. *Chemical Leaman Tank Lines v. United States*, 368 F. Supp. 925, 936 n.9 (D. Del. 1973); see also *Sisselman v. Smith*, 432 F.2d 750 (3d Cir. 1970); *Lincoln Transit Co. v. United States*, 256 F. Supp. 990, 993 (S.D.N.Y. 1966). The House Report accompanying the enactment of the statute (then worded somewhat differently) makes this unmistakably clear:

This section operates in all cases whether or not a hearing is required, *but it does not provide for a hearing where other statutes do not do so*. Nor does it diminish statutory rights to a hearing. H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 233, 275 (1946) (emphasis added).*

* This language of the House Report was addressed to the provision then denominated § 9(b) of the APA, but which is now § 9(c) and codified in 5 U.S.C. § 558(c). The provision, at the time of the House Report, read as follows:

Licenses. Agencies are required, with due regard for the rights or privileges of all the interested parties or persons adversely affected, to proceed with reasonable dispatch to conclude and decide proceedings on applications for licenses. They are not to withdraw a license without first giving the licensee notice in writing and an opportunity to demonstrate or achieve compliance with all lawful requirements except in cases of wilfulness or those in which public health, interest or safety requires otherwise. In businesses of a continuing nature, no license expires until timely applications for new licenses or renewals are determined by the agency. S. Doc. No. 248, *supra* at 274-75.

This language was modified somewhat by the time of the enactment of former § 9(b) in 1946, 5 U.S.C. § 1008(b), 60 Stat. 242 (1946); its final wording was closer to the language of the present § 9(c). This provision was reworded in 1966 in the recodification of Title 5, Pub. L. No. 89-554, 80 Stat. 388 (1966), but the changes in language were intended not to have any substantive effect. S. Rep. No. 1380, 89th Cong., 2d Sess. 20-21, 30.

The District Court properly distinguished *New York Pathological & X-Ray Laboratories v. Immigration and Naturalization Service*, 523 F.2d 79 (2d Cir. 1976), from the case at bar. As the Court in *New York Pathological* made clear, that case dealt with a situation which was, in effect, a *withdrawal* of a license. For 25 years the plaintiff in *New York Pathological* had been conducting laboratory tests of aliens seeking permanent-resident status. Therefore, the failure of the INS to designate it as an approved testing facility operated to revoke the plaintiff's permission to conduct the tests. See 523 F.2d at 80-81. Accordingly, the Court explicitly based its decision on that portion of § 558(c)—a section not at issue here—which requires an agency to provide a hearing on the “withdrawal, suspension, revocation or annulment of a license.” 5 U.S.C. § 558(c); 523 F.2d at 82. There is no such statutory requirement for the *grant* of a license.

The District Court was therefore correct in holding that the right to an opportunity to be heard on the approvals challenged by ACMC must be found outside the APA.

POINT II

The District Court did not err in holding that § 109(a) of the Hazardous Materials Transportation Act provides no right to notice and a hearing on the DOT approvals issued in compliance with the new regulations.

Because ACMC was required to show that a statute other than the APA required notice and a hearing, it added a new allegation in its amended complaint that § 109(a) of the HMTA, 49 U.S.C. § 1808(a), required DOT to afford notice and public participation before issuing inspection and manufacturing approvals to qualified

foreign applicants under 49 C.F.R. § 173.300a and b. In other words, although ACMC concedes that the regulations themselves are valid, *see supra* at 4, it nevertheless argues that the procedures for putting the regulations into effect are invalid.^{*} This contention is based on a tortured misreading of the plain language of the statute.

49 U.S.C. § 1808(a) provides in relevant part:

The Secretary [of Transportation] is further authorized, after notice and an opportunity for a hearing, to issue *orders directing compliance* with this chapter or regulations issued under this chapter; the district courts of the United States shall have jurisdiction, upon petition by the Attorney General, to enforce such orders by appropriate means. (emphasis added).

ACMC reads this provision to mean that notice and an opportunity to be heard must be provided before DOT may issue any "order" as defined in the APA, 5 U.S.C. § 551(6).^{**} Brief for Appellant at 21-23. It contends that the inspection and manufacturing approvals at issue here are "orders" as defined in the APA and, therefore, that 49 U.S.C. § 1808(a) requires that notice and an

^{*} Neither this contention, nor any other put forward in this litigation, was ever advanced during the course of ACMC's vigorous participation in the six-year rulemaking proceeding which led to the adoption of the new regulations. *Supra* at 9.

^{**} 5 U.S.C. § 551(6) defines an order, for purposes of the Administrative Procedure Act, as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing." Since 49 U.S.C. § 1808(a) deals solely with compliance orders under the HMTA, it is not necessary to discuss whether the APA's definition of "order" includes the inspection and manufacturing approvals at issue here.

opportunity for a hearing be provided in connection with each application for an inspection or manufacturing approval submitted to DOT pursuant to 49 C.F.R. § 173.300a and 300b. *Id.*

That, however, is not what the statute says. 49 U.S.C. § 1808(a) is not addressed to orders falling within the broad definition of the APA. Rather, it authorizes the Secretary of Transportation to issue *compliance orders* to enjoin violations of the HMTA and regulations promulgated thereunder.

A compliance order under 49 U.S.C. § 1808(a) is quite different from other "orders" which might fall within the APA definition. A compliance order pursuant to 49 U.S.C. § 1808(a) is directed at preventing violations of DOT regulations. The special nature of a § 1808(a) order is evident from the wording of the statute itself. Section 1808(a) refers to the *enforcement* of compliance orders by appropriate means. This enforcement is not accomplished by internal agency procedures; rather, it entails proceedings in the United States District Courts commenced by a petition from the Attorney General. That a § 1808(a) order directing compliance differs from other "orders" is also apparent from a reading of 49 C.F.R. § 107.307 ("Compliance orders generally"), which defines the scope of a compliance order issued pursuant to § 1808(a):

When the OHMO has reason to believe that a person is *engaging in conduct which involves a violation of any provision of this subchapter [B] or Subchapter C of this chapter for which the OHMO exercises enforcement responsibility, or of any exemption issued under Subpart B of this Part, and if time, the nature of the violation, and the public interest permit, the OHMO may conduct proceedings pursuant to section 109(a) of the Act [49 U.S.C. § 1808(a)] to determine the nature*

*and extent of the violation and may thereafter issue an order directing compliance.** (Emphasis added).

An application for inspection or manufacturing approval, and DOT's decision to grant or withhold approval, can in no way be characterized as a "violation" which can trigger the compliance order enforcement procedures set forth in 49 U.S.C. § 1808(a). 49 U.S.C. § 1808(a) therefore has no bearing at all on the DOT approvals under 49 C.F.R. §§ 173.300a and 300b.

That 49 U.S.C. § 1808(a), and hence its requirement of notice and hearing, apply only to compliance orders was made clear in the notice published in the *Federal Register* in connection with the adoption of amendments to the DOT regulations relating to compliance orders (codified at 49 C.F.R. §§ 107.307-.321). The notice specified that "[s]ections 107.307 through 107.321 set forth the procedures applicable to the issuance of compliance orders under section 109(a) of the Hazardous Materials Transportation Act [49 U.S.C. § 1808(a)]." 41 Fed. Reg. 38167, 38169 (Sept. 9, 1976) (emphasis added).**

On this appeal, ACMC advances the anomalous argument that while the regulations themselves—including the detailed approval procedures—are valid, the actual granting of the inspection and manufacturing approvals pursuant to these valid regulations is unauthorized. Brief

* Subchapter B deals with hazardous materials. Subchapter C comprises hazardous materials regulations, including the inspection and manufacturing requirements at issue here and compressed gas cylinder specifications. Subpart B sets forth regulations relating to exemptions from hazardous materials regulations.

** It is well settled that a court faced with a question of statutory construction "shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). See *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945).

for Appellant at 16-23. DOT is surely able to follow the approval mechanism set forth in its valid regulations. Its authority to adopt regulations—and to carry out their mandate—explicitly appears in 49 U.S.C. § 1804(a).

The District Court was thus correct in holding that 49 U.S.C. § 1808(a) does not require DOT to permit domestic cylinder manufacturers to participate with DOT in evaluating approval applications submitted by foreign cylinder producers.

POINT III

ACMC lacks standing to challenge the approvals issued by DOT under the regulations.

The Supreme Court has recently had occasion to reiterate the requirements for standing to challenge a governmental action:

The essence of the standing question, in its constitutional dimension, is “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” [*Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)], quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, see *United States v. SCRAP*, 412 U.S. 669, 688 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant’s acts or omissions. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *O’Shea v. Littleton*, 414 U.S. 488, 498 (1974); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260-61 (1977). In

addition, the plaintiff must demonstrate that his injury is one which is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, (1976). This Court, distilling the teachings of these and other cases, has summarized the showing a plaintiff must make to support his claim of standing to sue:

In other words, a plaintiff must show injury; he must trace it to the defendant's allegedly unlawful acts; and he must show that the remedy he seeks is likely to redress his injury.

City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1050 (2d Cir. 1977) (*en banc*).

An association may have standing to sue either on its own behalf or as the representative of its members, but the association must nevertheless meet the constitutional requirements of a case or controversy. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). It

must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. [*Citing Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972)] *Id.*

ACMC claims standing to sue in its capacity as the representative of its members. Although it has attempted to portray itself as the protector of the public safety (*see e.g.*, 44-45a; 114-16a; Brief for Appellant at 27-28), ACMC's only remotely plausible claim of injury—and hence the only basis for asserting that it has standing to sue here—is that the entry for the first time of foreign-made cylinders into the United States market will cause its members to lose profits and sales. *See* Brief for Appellant at 29-36.

It is well settled that economic injury resulting from governmental action which fosters lawful competition does not in itself confer standing. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 927 (2d Cir. 1968).^{*} In *Machinery Dealers National Association ("MDNA") v. Lockheed Aircraft Corp.*, Dkt. No. 75-1958 (D.C. Cir., August 25, 1977)—a case indistinguishable from the case at bar—the court held that a trade association alleging economic and competitive injury of the sort claimed in this action by ACMC had failed to allege that its members had suffered the “injury in fact” which is the *sine qua non* of standing. The court concluded, therefore, that the trade association lacked standing to sue.^{**}

^{*} ACMC asserts in its brief that *Perkins* “is no longer good law.” Brief for Appellant at 32. However, the cases which have expanded on *Perkins* in the area of disappointed bidders on the government contracts deal with “an exception recognized in [Perkins], where Congress has by ‘constitutional legislation’ recognized the legal right of a bidder for government contracts” to receive such contracts in particular situations, such as legislation favoring small businesses. *Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d 1080, 1086 (6th Cir. 1975). ACMC has failed to point to any relevant “constitutional legislation” which would confer on domestic cylinder manufacturers the right to decide who their competitors will be.

^{**} It is important to note that *Machinery Dealers National Association* was decided by the Court of Appeals for the District of Columbia Circuit—the same court that decided *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1972). This, of course, indicates that the District of Columbia Circuit has not seen fit to extend its holding in *Scanwell*, which dealt with the standing of disappointed bidders for governmental contracts, to confer standing on parties alleging economic injury as the result of benefits conferred on their competitors by governmental action.

It should also be noted that *Scanwell* has not been adopted in this Circuit. See *Morgan Associates v. United States Postal Service*, 387 F. Supp. 947 (S.D.N.Y.), *aff'd on other grounds*, 511 F.2d 1223 (2d Cir. 1975). But cf. *Union Carbide Corp. v. Train*, 73 F.R.D. 620 (S.D.N.Y. 1977).

The plaintiff in *MDNA* was a trade association representing members who buy and sell used industrial machinery. MDNA claimed to represent its members who, it contended, had suffered economic harm as a result of the General Services Administration's decision to sell certain surplus machinery to Lockheed. Slip. op. at 2-9. The injuries alleged were that GSA's sale deprived MDNA's members of an opportunity for profit and that the challenged sale subjected the association's members to increased competition. *Id.*, at 2-9, 16. The trade association contended that these allegations gave it standing to sue.

The court held that MDNA had failed to demonstrate that any of its members had suffered injury in fact and therefore concluded that the trade association lacked standing to sue. It analyzed the characteristics of the "injury in fact" needed to confer standing:

An "injury in fact" need not be substantial to support federal court jurisdiction over this challenge to agency action; an identifiable trifle will suffice. *United States v. SCRAP*, [412 U.S. 669, 689 n.14 (1973)]; K. Davis, *Administrative Law Treatise* §§ 22.09-5, 22.09-6 (Supp. 1970). The injury may be one which MDNA's members have already sustained or are immediately in danger of sustaining. *O'Shea v. Littleton*, 414 U.S. 488, 494, (1974). Nonetheless, the injury must be perceptible, concrete, specific, *United States v. SCRAP*, *supra* at 689, and real and immediate rather than conjectural or hypothetical. *California Bankers Association v. Shultz*, 416 U.S. 21, 69 (1974); *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). The injury must be particularized. *Schlesinger v. Reservists Committee to Stop the War*, [418 U.S. 208, 220 (1974)], and capable of direct redress by the court through the requested remedy. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-19

(1973). A plaintiff may not rely on "the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief." *Warth v. Seldin*, *supra* at 507; see *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-46; *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976).

Slip op. at 11.

The court then analyzed *Warth v. Seldin*, *supra*, which also involved a plaintiff's claim of interference with the profitability of an ongoing business as the result of government action, and concluded that

to establish standing to seek redress for an economic injury to a competitive interest a plaintiff must demonstrate that within a reasonably proximate period prior to the commencement of the suit some action to further that competitive interest had been taken and had been interfered with, or that such action to be taken in the future was contemplated at that time. Otherwise, there is no non-speculative basis to conclude that the grant of relief might actually improve the statute of the claimant.

Slip. op. at 14.

The court specifically held that the trade association's allegations of economic injury from increased competition were unsupported by any "particularized," *Warth v. Seldin*, *supra*, 422 U.S. at 508, allegations, that the challenged government action had resulted in or would, in the future, result in increased competition. Consequently, the court held that the plaintiff trade association had failed to make "non-speculative", *MDNA v. Lockheed*, *supra*, slip op. at 14, allegations of economic injury to its members stemming from the government action, and hence

that the requisite injury in fact did not exist to confer standing.

ACMC failed to make any particularized, non-speculative allegations that its members have taken or intend to take any action in furtherance of their competitive interests, or that the issuance of the approvals will in any way interfere with those interests. In fact, there is absolutely nothing in the record of the case at bar which even remotely suggests that ACMC's members will suffer any harm, economic or otherwise, as a result of DOT's granting inspection or manufacturing approvals pursuant to 49 C.F.R. § 173.300a and b, aside from an unsupported, conclusory statement from the chairman of ACMC that its members will suffer "the loss of cylinder sales." (23a). The record is similarly devoid of any allegations supporting the non-economic "injuries" which have been alleged for the first time on this appeal. There has been no proof in the record that the approvals will adversely affect the "generalized safety of the cylinder industry." (Brief for Appellant at 27).^{*} There has also been no proof that "the price of product liability insurance would rise tremendously" if "unsafe" cylinders were permitted to enter the United States, *id.*, or that the introduction of "defective cylinders could . . . result in even stricter regulation of the industry in the future." *Id.*

ACMC makes much of the fact that members of "the industry" have participated in the past in DOT regulatory activities. Brief for Appellant at 7-9. Although the precise relevance of this participation to the case at bar is not entirely clear, ACMC appears to argue that its past involvement with DOT, and that of its members, gives it standing to sue in this action, on the ground that

^{*} In fact, DOT—the agency to which Congress has entrusted the protection of transportation safety (a duty not, contrary to ACMC's desire, so entrusted to the domestic cylinder manufacturers' trade association)—has concluded that the new regulations will *increase* transportation safety. 41 Fed. Reg. 18412-13.

its past participation places it within the "zone of interest" of some statutory guarantee, cf. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). The problem with this argument is that ACMC has not pointed to any statute which protects the interest ACMC asserts here. The only statute discussed in its brief is the Hazardous Materials Transportation Act, but the Congressional purpose behind the enactment of the HMTA was not to protect domestic manufacturers from foreign competition, or to give domestic manufacturers the right to decide which foreign firms will be permitted to enter the United States cylinder market. The Congressional intent was, instead, "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. § 1801.

Judge Pollack, in his opinion below, effectively disposed of the unusual notion that past involvement with a regulatory agency creates standing to assert a "right" to participate in every phase of the agency's regulatory activity:

Volunteered participation in agency function by a trade association is a privilege which does not ripen into a right to intervene and be heard in the absence of a grant of status by Congress or agency regulations. The fitness of a prospective licensee is a matter of agency determination so far as concerns a stranger to the application unless there is a statutory or regulatory requirement otherwise. (137a).

ACMC has failed to meet the requirement that it allege a "demonstrable, particularized injury," *Warth v. Seldin*, *supra*, 422 U.S. at 508, upon which standing to sue may be based. The facts alleged also "fail to support an actionable causal relationship", *id.*, at 507, between the issuance of the inspection and manufacturing approvals

and any claimed injury to ACMC's members. Instead, ACMC has merely asserted

little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had the respondents acted otherwise, and might improve were the court to afford relief. *Id.*

Judge Pollack thus was correct when he observed that it is "highly doubtful" that ACMC has standing to review the action of DOT in granting approvals to strangers to ACMC. (134a).

POINT IV

ACMC may not raise in this litigation, for the first time, its contention that DOT is required to afford "public participation" in each application approval.

As set forth above, never in the course of its extensive participation in all phases of the six-year rulemaking proceeding did ACMC assert its novel idea of "public participation" in each application approval. This proposal did not appear in any of ACMC's comments; it was not advanced at any time in the hearings. (28a); *see supra* at 9. And ACMC failed to raise this point despite the fact that it was, as the District Court found, "within the scope of the rule-making." (130a). Only in July 1976—nearly three months after the final amendments were published and made effective—did ACMC raise this point by letter and in oral requests. Amended Complaint ¶¶ 18-19.*

* It should be noted that even if OHMO's alleged delay in responding to ACMC's requests to intrude into OHMO's decision-making process were relevant to any issue before this Court—and it is not—there has been no showing of excessive or arbitrary delay, *Kessler v. Federal Communications Commission*, 326 F.2d 673, 684 (D.C. Cir. 1963), or that there is any reason for this

[Footnote continued on following page]

These "requests" were an apparent attempt to thwart the enforcement of the regulations that emerged from the extensive rulemaking proceeding. In any event, they were made well after the agency proceedings had been concluded.

ACMC, in the rulemaking proceeding, could have made the point it now seeks to assert; it did not. It is well settled that a position not asserted in agency proceedings cannot be raised for the first time in a court:

[C]hallenges to standards must be limited to points made by petitioners in agency proceedings. To entertain comments made for the first time before this court would be destructive of a meaningful administrative process.

Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973). See also *New York v. United States*, Dkt. No. 76-4084 (2d Cir., Mar. 2, 1977). ACMC's present contention is thus not an issue which may properly be presented for the first time in this litigation.

Court to depart from the general principle that an agency's determination to undertake or not a particular regulatory activity is unreviewable. *Kixmiller v. Securities and Exchange Commission*, 492 F.2d 641 (D.C. Cir. 1974). In any event, the remedy even in those cases where the court has found an unreasonable delay in agency action is a remand to the agency for solution by it. *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the amended complaint should be affirmed.

Dated: New York, New York
December 19, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Appellees Depart-
ment of Transportation, Adams,
Fearnside and Roberts.*

RICHARD N. PAPPER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

19th day of December 1977

That on the two copies she served ~~a copy~~ of the

within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

John Collins, Esquire
Reboul, MacMurray Hewitt Maynard & Kristol
75 Rockefeller Plaza
New York, New York 10020

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Merian J. Bryant

19th day of December, 19 77

Neph. Lee

Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979